

STATE OF MICHIGAN
COURT OF APPEALS

RON COLE,

Plaintiff-Appellee,

v

CARL VAN WERT, PEGGY HOWARD,
SUZANNE ALEXANDER, CHARLES LONDO,
GERALD L. JOHNSON, TILMAN
CRUTCHFIELD and COUNTY OF MONROE,

Defendants-Appellants.

UNPUBLISHED

September 20, 2005

No. 255208

Monroe Circuit Court

LC No. 00-011105-CZ

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted from two orders enforcing a settlement agreement between the parties. We affirm.

Defendants argue that the trial court erroneously interpreted its settlement agreement with plaintiff. The issues on appeal are threefold: whether under the terms of the settlement agreement (1) plaintiff has a right to make a spousal-survivorship election, (2) plaintiff's monthly payment amount is subject to Social Security setoffs, and (3) plaintiff's monthly payment amount is affected by his contribution withdrawal in 1998. Resolution of these issues turns on this Court's interpretation of the parties' settlement agreement.

The proper interpretation of a contract is a question of law which this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Grand Trunk Western Railroad, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). "An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). Under usual contract principles, a party is bound by a settlement agreement absent a showing of mistake, fraud, or unconscionable advantage. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998).

"The primary goal of contract interpretation is to honor the intent of the parties." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). This entails a reading of the

contract as a whole and an application of its clear language. *Id.* “If the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense.” *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). A contract is ambiguous when it may reasonably be understood in different ways. *Id.* Where the terms of the agreement are unambiguous, they are construed as a matter of law; but where the meaning is unclear or reasonably susceptible to more than one meaning, interpretation becomes a question of fact, and the court may consider extrinsic evidence to determine the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The threshold question is whether the terms of the settlement agreement are ambiguous. We agree with the trial court that the agreement is an unambiguous contract that can be interpreted as a matter of law.

The key clauses of the settlement agreement, which were subsequently incorporated into the trial court’s December 3, 2001, order approving settlement, provide:

That the County will provide Cole ***with a full 30 year pension or a pension pursuant to existing contracts governing the pension with all elections available under the contract based on Cole’s rate as undersheriff.*** The final average number which will be used to calculate Ron Cole’s pension based on his salary as undersheriff is \$61,000.00.

Defendants will pay the pension in full. The method of payment shall be at the discretion of Defendants, however, Defendants are liable to pay the entire pension even if the annuity company is unable to pay the full pension. Defendants may pay by annuity or cash as long as all payments under the pension are made when required by the contract governing the pension. The Defendants shall have sole discretion to select the annuity if they desire to use an annuity. [Emphasis added.]

Defendants argue that the “full 30 year pension” clause, when read in conjunction with “pursuant to existing contracts governing the pension” means that plaintiff’s “full” pension is limited by the one-time election he made at the time of his disability retirement and by his previous withdrawal of pension contributions, and that defendants agreed only to “subsidize” plaintiff’s twenty-four years of service retirement, so that he instead received pension amounts based on thirty years of service. Plaintiff contends that the phrase “full 30 year pension” means a full retirement pension, as though plaintiff were retiring after thirty years of service and had never received disability retirement. Plaintiff further argues that “with all elections available under the contract” means that he is not bound by the rules set forth in the Monroe County Employees Retirement System Ordinance (the ordinance), that he is entitled to make a survivorship election, and that defendants are responsible for securing another independent annuity to cover the difference between his “new” election and previously selected 100% spousal survivorship benefit under the plan.

Under the terms of the settlement agreement, plaintiff is to receive a “full 30 year pension” The failure to define a contract term does not render the contract ambiguous. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, the terms of a

contract must be interpreted in accordance with their commonly used meanings. *Id.* When appropriate, this Court may refer to dictionary definitions to ascertain the precise meaning of a particular term. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). The term “full” has been defined as: “(1) containing as much or as many as is possible or normal,” and “(2) complete especially in detail, number or duration, lacking restraint, check, or qualification, having all distinguishing characteristics.” Merriam-Webster’s Dictionary (2001).

Applying this plain meaning, the phrase “full 30 year pension,” means that the amount owed to plaintiff is the amount he would have received had he had a “normal” retirement with thirty years of credited service, without restriction. The record reveals that this amount, exclusive of whether plaintiff’s survivorship election and prior annuity withdrawal affect plaintiff’s monthly benefit amount, is \$3,812.50 a month. Pursuant to the terms of the settlement agreement, plaintiff shall receive this total amount each month, with the defendants and the Monroe County Employees Retirement System Board of Trustees contributing their respective shares.

With respect to Social Security setoffs, the record is devoid of any reason why defendants are entitled to apply a setoff from the amount they owe plaintiff. Defendants agreed to broad release language that released all their claims against plaintiff, including claims under “any other applicable Federal, State or local statutes, ordinances, rules or regulations,” which include Social Security setoffs. Defendants fail to explain how the language of the agreement entitles them to setoffs. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the party’s claim. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). In this regard, the trial court correctly ordered:

[T]hat Defendant shall pay Plaintiff the full past retirement benefits without any set off for Social Security by October 16, 2002 and shall continue making payments in a timely manner on a monthly basis.

* * *

[T]hat Plaintiff shall provide a certification of earnings by October 15, 2002, to the retirement board for the sole purpose of determining what part of the retirement benefit the county shall pay versus the amount paid by the retirement board. The Defendants are liable for the full amount of the retirement benefit regardless of what part is paid by the Monroe Retirement Board or by an annuity. The Defendants shall not set off any part of the amounts owing to Plaintiff and/or settlement with Social Security.

The remaining issues, therefore, are whether plaintiff’s prior survivorship election or contribution withdrawal affects his monthly benefit owed by defendants.

Under the terms of the agreement, plaintiff is entitled to make a survivorship election as part of his “full” retirement, and that his prior contribution withdrawal does not affect his monthly payment. Had plaintiff had a “normal” retirement after thirty years of credited service, he would have been entitled to make a survivorship election under § 8.7 of the ordinance. Accordingly, part of his “full 30 year pension” includes a survivorship election.

But defendants argue that the phrase “pursuant to existing contracts governing the pension with all elections available under the contract” precludes plaintiff from making a “second” election,¹ and that his monthly payment must be reduced because of his prior contribution withdrawal. This argument is without merit. The phrase “pursuant to existing contracts governing the pension with all elections available under the contract” unambiguously refers to the ordinance provisions that establish the process for the disbursement of plaintiff’s “full” pension.

Even assuming that this phrase refers to plaintiff’s prior election and withdrawal contracts, those contracts would nevertheless be superseded by the clause in the settlement agreement that provides “[t]hat the terms of this Agreement and Release are contractual and not a mere recital and represent the entire agreement of the parties and supersede any other prior agreement, whether written or oral.” Further, if plaintiff’s prior election and withdrawal affected his settlement amounts, the phrase “full pension” would be rendered meaningless since plaintiff’s pension would be subject to qualification or limitation, and thus not “full” as the agreement states. Moreover, including the portion of the phrase “with all elections available” would be senseless if it referred to a nonexistent election option. “Courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Defendant nevertheless argues that Section 8.7 of the ordinance bars plaintiff from making a second election. The record shows that this is an extraordinary case where plaintiff is being treated different from a typical retiree under the retirement rules. Specifically, it was explained to the trial court that under the retirement system, a “disability” retiree never changes status to become a “normal” retiree.

The only reason that plaintiff is considered a “normal” retiree for purposes of defendants’ settlement obligation is because the parties agreed to treat him as such in order to settle a lawsuit. Under the ordinance a “‘member’ means any person who is included in the membership of the retirement system.” The ordinance does not contain a provision governing the specific circumstance where a member’s classification changes from a “disability” retiree to “normal” retiree. But the ordinance does provide that a “member may elect to have pension payments made under any one of the following forms of payment and to name a survivor beneficiary.” The ordinance further provides that a member is entitled to a refund of his contributions. Plaintiff, by accepting a “full 30 year pension,” albeit through settlement and for a second time, qualifies as a “member” who is entitled to the benefits set forth in the ordinance. Logically, it is indeed difficult to reconcile how plaintiff could make an exclusive, ex-post facto contribution withdrawal or survivorship election on a pension he did not have at the time those elections were made. Thus, defendants’ reliance on the strict rules set forth in the ordinance is unpersuasive and

¹ Plaintiff applied for and received a disability retirement after twenty-four years of service. Plaintiff elected at that time “Form of Payment A,” which provided plaintiff with life payments with full continuation to his survivor, under § 8.7 of the ordinance. Section 8.7 states, “Once selected, a form of payment may not be changed.”

asks this Court to rewrite the contract to include a provision that is nonexistent. This Court will not rewrite the parties' contract under the guise of interpretation. See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991).

With respect to the survivorship election, the trial court correctly ordered:

It is ordered and determined that the Plaintiff has the right to make an election with reference to his full 30-year pension which began when Plaintiff obtained age 50 on July 30, 2002. The specific election available to the Plaintiff is that spelled out in section 8.7 of the Monroe County Employee's Retirement Plan Restated Ordinance. It is noted that the Plaintiff made his election on the record at a hearing on April 28, 2003 as 'form of payment B – life payments with ½ continuations to survivor beneficiary'. The beneficiary is the spouse of Plaintiff, Patricia Cole, whose birth date is September 20, 1954.

With respect to plaintiff's annuity withdrawal, the trial court correctly ordered:

It is determined and ordered that the full 30-year pension afforded to the Plaintiff by reason of the Court Ordered Settlement is not to be reduced on account of any contribution or annuity withdrawal made by the Plaintiff prior to December 3, 2001 and that therefore there is to be no 'annuity withdrawal adjustment.'

Plaintiff is entitled to receive a monthly pension totaling the amount he would have received had he been a "normal" retiree with thirty years of credited service who had never been on disability retirement. Although the trial court initially found that this amount was \$3,812.50 a month, it subsequently noted that this amount did not account for plaintiff's fifty percent survivorship election, and ordered defendants to calculate the correct amount. Defendants should pay the difference between the correct amount and any amount the Board paid.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly